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HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

NO. 369

KEYSTONE METAL COMPANY, Petitioner,

v.

CITY OF PITTSBURGH, JAMES P. KIRK, Treasurer of the City of Pittsburgh, SCHOOL DISTRICT OF PITTSBURGH, et al., etc., Respondents.

PETITION OF KEYSTONE METAL COMPANY FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA AND BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INDEX.

PAGE

Petition of Keystone Metal Company for a Writ of Certiorari to the Supreme Court of Pennsylvania 1

Summary Statement of the Matter Involved... 2

A. The Proceedings Below..... 2

B. The Facts of the Case..... 3

Jurisdiction 9

Questions Presented 11

Reasons Relied On for the Allowance of the Writ of Certiorari..... 12

Brief in Support of Petition for Writ of Certiorari.. 13

Opinions Below 13

Jurisdiction 14

Statement of the Case..... 14

Specification of Errors to Be Urged..... 14

Summary of the Argument..... 15

Argument 17

I. The court erred in failing to follow the applicable decisions of this Court which hold that local privilege taxes may not be imposed upon the gross receipts of transactions in interstate commerce by ruling that Article I, Section 8, of the Constitution of the United States does not prohibit the City and School District of Pittsburgh from imposing their mercantile license taxes upon the gross proceeds of the interstate sales made by Keystone to Westinghouse and National 17

Cases Cited.

PAGE

II. The court erred in holding that the local taxation of gross receipts from sales in interstate commerce is unconstitutional only where such interstate sales are subject to taxation by other states 22

III. The court erred in applying to this case decisions of this Court holding that Article I, Section 8, of the Constitution of the United States does not prohibit the local taxation of intrastate activities merely because such activities have incidental interstate attributes 25

IV. Conclusion 29

CASES CITED.

Allegheny County Motor Co. v. Pittsburgh, 360 Pa. 407, 62 A. 2d 64 (1948) 18

Blauner's, Inc. v. Philadelphia, 330 Pa. 340, 198 A. A. 889 (1938) 18

Crew Levick Co. v. Pennsylvania, 245 U. S. 292, 38 S. Ct. 126 (1917) 18, 19

Department of Treasury of Indiana v. Wood Preserving Corporation, 313 U. S. 62, 61 S. Ct. 885 (1941) 25, 26

Federal Drug Company v. Pittsburgh, 358 Pa. 454, 57 A. 2d 849 (1948) 18

Freeman v. Hewit, 329 U. S. 249, 67 S. Ct. 274 (1946) 20, 23

Gwin, White & Prince v. Henneford, 305 U. S. 434, 59 S. Ct. 325 (1939) 19, 22

Statutes Cited and Ordinance Cited.

PAGE

International Harvester Co. v. Department of Treasury, 322 U.S. 340, 64 S. Ct. 1019 (1944) 25

Interstate Oil Pipe Line Co. v. Stone, 337 U. S. 662, 69 S. Ct. 1264 (1949) 25

J. D. Adams Manufacturing Co. v. Storen, 304 U. S. 307, 58 S. Ct. 913 (1938) 19, 22, 23

McGoldrick v. Berwind-White Coal Mining Co., 309 U. S. 33, 60 S. Ct. 388 (1940) 25

Norton Company v. Department of Revenue of Illinois, 340 U. S. 534, 71 S. Ct. 377 (1951) 25

Puntureri v. Pittsburgh School District, 359 Pa. 596, 60 A. 2d 42 (1948) 18

Western Live Stock v. Bureau of Revenue, 303 U. S. 250, 58 S. Ct. 546 (1938) 22, 25, 28

Wiloil Corporation v. Commonwealth of Pennsylvania, 294 U. S. 169, 55 S. Ct. 358 (1935) 25

Wilson v. Cook, 327 U. S. 474, 66 S. Ct. 663 (1946) ... 10

STATUTES CITED.

Pennsylvania Act of June 20, 1947, P. L. 745 (24 Purdon's Statutes, 582.1 et seq.) 3, 9, 11

Pennsylvania Act of June 25, 1947 (53 Purdon's Statutes 2015.1-2015.8) 3, 11

Title 28, U. S. Code, Section 1257 (3) 9, 10, 14

ORDINANCE CITED.

City of Pittsburgh Ordinance No. 488 of 1947....3, 9, 11

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PETITION OF KEYSTONE METAL COMPANY FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

To the Honorable, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

The petitioner, Keystone Metal Company, respectfully prays that a writ of certiorari issue to review a decision of the Supreme Court of Pennsylvania, entered June 26, 1953, affirming in part and reversing in part a decision of the Court of Common Pleas of Allegheny County, Pennsylvania, entered October 29, 1952.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

A. The Proceedings Below.

These proceedings arise out of petitions filed in the Court of Common Pleas of Allegheny County, Pennsylvania, by Keystone Metal Company (hereinafter called "Keystone") appealing certain deficiencies in mercantile license taxes assessed against Keystone by the Respondents, City of Pittsburgh (hereinafter called "City") and School District of Pittsburgh (hereinafter called "School District"). The deficiencies here involved relate to Keystone's mercantile tax liabilities for the calendar year 1948, amounting to $9,935.37, plus penalties and interest in the amount of $4,023.32, in the case of the City, and $4,967.63, plus penalties and interest in the amount of $2,011.91, in the case of the School District.

The appeals from the City and the School District assessments were consolidated for trial upon facts stipulated by the parties, and the chief issue was whether or not the tax deficiencies in question were illegal by reason of being imposed upon receipts derived from sales in interstate commerce. The trial court by decree dated February 20, 1952, dismissed Keystone's appeals, concluding as a matter of law that even though the sales in question constituted business in interstate commerce, the mercantile tax assessments did not contravene the commerce clause of the Federal Constitution.

Keystone filed exceptions to the decree and conclusion of the trial court, and these exceptions came before the court *en banc* which, by a decree entered on October 29, 1952, affirmed the ruling of the trial judge except that

it relieved Keystone of all penalties and interest accrued against the deficiency assessments.

Keystone appealed so much of the said ruling as upheld the deficiency assessments to the Supreme Court of Pennsylvania, and the City and School District filed cross-appeals from so much of the said ruling as relieved Keystone from the payment of penalties and interest.

The Supreme Court of Pennsylvania in an opinion filed on June 26, 1953, reported at 374 Pa. 323, affirmed the decision of the court below relative to the propriety of the deficiency assessments and reversed the decision of the court below on imposition of penalties and interest.

B. The Facts of the Case.

Act No. 481 of the General Assembly of Pennsylvania, approved June 25, 1947 (53 P. S. 2015.1-2015.8), authorized the City of Pittsburgh to impose such taxes as it should determine upon persons, transactions, occupations, privileges, subjects and personal property within the limits of the City. Pursuant to said enabling act, the City, by Ordinance No. 488 of 1947, imposed a Mercantile License Tax, effective January 1, 1948, on wholesale and retail vendors of goods, wares and merchandise, said tax being measured by the actual or formula-computed gross receipts of each such vendor during the preceding calendar year.

Act No. 320 of the General Assembly, approved June 20, 1947, P. L. 745 (24 P. S. 582.1 *et seq.*) imposed in behalf of the School District of Pittsburgh a Mercantile License Tax similar to that enacted by the City.

Keystone is engaged in the business of buying, selling and dealing in nonferrous metals, conducting its business from an office in the City of Pittsburgh. During the period here in question, Keystone sold large quantities of copper scrap to Westinghouse Electric Corporation (hereinafter called "Westinghouse") and National Electric Products Corporation (hereinafter called "National"). Both such corporations are Pennsylvania corporations, and both at all times here material maintained offices in Pittsburgh. (R. 5-6, 31)

All such sales of copper scrap to Westinghouse and National in the base period were made in the following manner:

Westinghouse and National, during the year 1947, had placed purchase orders for specified quantities of copper scrap with Keystone's predecessor. Such purchase orders specified that the copper scrap was to be shipped to a refinery operated by the American Metal Company at Carteret, New Jersey, shipment to be made in 45 to 60 days after the order was placed, by prepaid freight, f.o.b. destination. Each such purchase order called for specified amounts of copper scrap which could be of three different grades, and specified a tentative delivery price for each of such three grades of copper, such tentative prices to be adjusted to conform to the prevailing market prices for copper scrap quoted in a specified trade magazine on the date of shipment. Such purchase orders contemplated that upon delivery to the refinery at Carteret, New Jersey, the copper scrap was to be assayed or analyzed to determine metal content, grade and weight of the shipment, such assay or analysis to be de-

terminative of the final price of each shipment. (R. 6-7, 33)

In taking over the business of its predecessor, Keystone fulfilled these orders during the year 1947. In fulfilling such orders *Keystone placed its own purchase orders for copper scrap* of the qualities and in the amounts specified in the Westinghouse and National purchase orders, *with suppliers located,* with two exceptions, *outside Pennsylvania.* Such suppliers then shipped the copper scrap directly to the refinery at Carteret, New Jersey, for the account of Westinghouse or National, as the case might be. (R. 7, 33) The suppliers immediately notified Keystone of such shipment and thereupon received from Keystone 80% of the tentative price agreed upon in advance for such shipment by Keystone and the supplier. Such price was subject to later adjustment based on the results of assay or analysis of the shipment after delivery at the refinery. Upon receiving notice of such shipments from its suppliers, Keystone immediately billed Westinghouse or National, as the case might be, for 80% of the tentative price under the Westinghouse or National purchase orders. (R. 9-10, 34).

Upon delivery of each shipment of copper scrap to the refinery, it was assayed or analyzed to determine metal content, weight or grade, the cost of such analysis being shared equally by Keystone and Westinghouse or National. If the scrap as assayed satisfied specifications, the shipment *was accepted* by American Metal Company on behalf of Westinghouse or National, as the case might be. (R. 7-8, 35) After the assay of each shipment had determined the exact quality and weight of copper, Westinghouse or National sent Keystone

statements showing the results of the assay, the price adjustments, the final price of the shipment and the balance due Keystone. Keystone then forwarded such information to its supplier and paid the balance to the supplier for each shipment. (R. 10-11, 34)

Following the acceptance of each shipment of copper scrap *at the refinery, Westinghouse or National,* as the case might be, then *traded the particular shipment to the American Metal Company for an equal weight of refined copper and paid American Metal Company the difference between the then current market price of copper scrap and the higher current market price of refined copper.*

Such exchange was effected in two steps: (a) the refinery shipped the refined copper to a rolling mill located in either New York or Connecticut, which was designated by Westinghouse or National, for the account of Westinghouse or National; and (b) the refinery simultaneously took title to the scrap shipment received from Keystone's supplier and co-mingled it with its existing inventory of copper scrap. Thereafter the refinery used its constantly replenished scrap copper inventory in its smelting and refining operations and disposed of the refined copper so produced to its customers in the ordinary course of business. (R. 8-9, 35-36)

The deficiencies in mercantile license taxes assessed against Keystone by the City and School District resulted principally from the inclusion of these sales to Westinghouse and National in Keystone's gross volume of business for the calendar year 1947. (R. 12, 37)

Based on the facts as found, the trial court made the following conclusions of law, *inter alia*:

"3. The transactions between plaintiff and Westinghouse Electric Company and between plaintiff and National Electric Products Corporation, in which plaintiff orders copper scrap from suppliers within and without Pennsylvania to be shipped by such suppliers to an independent refinery in New Jersey, constituted business in interstate commerce.

"4. Because no state other than Pennsylvania could impose excise taxes measured by gross receipts upon the above transaction, the mercantile taxes of defendants could not operate to regulate such commerce in contravention of Article I, Section 8 of the Constitution of the United States." (R. 51)

In due course Keystone filed exceptions, *inter alia*, to the fourth conclusion of law, set out above, and to the trial court's failure to grant Keystone's thirty-fourth and thirty-sixth requests for findings of facts and conclusions of law, which requests read as follows:

"34. The City and School mercantile license taxes are taxes on the privilege of carrying on the business of selling goods and merchandise."

"36. To the extent that in the computation of Keystone's mercantile license tax liabilities there are included in the annual gross volume of business the proceeds of sales in interstate commerce such taxes are direct taxes upon such interstate commerce, which no state or municipality may constitutionally impose."

No exception to the trial court's third conclusion of law was taken by either the City or the School District.

The lower court *en banc* on October 29, 1952, sustained Keystone's exception to the trial court's failure to grant its thirty-fourth request for findings of fact and conclusions of law. (R. 77, 78) However, the court *en banc* sustained the trial court in all other respects and entered a final decree ordering Keystone to pay the amounts of the respective deficiency assessments levied for the calendar year 1948, but without penalties or interest. (R. 77-79)

The Supreme Court of Pennsylvania in its opinion filed on June 26, 1953, held that the sales in question, while transactions "in interstate commerce", contained certain "intrastate events" or "local activities" justifying the imposition of the tax.

It is to review that decision that the present Petition is being filed.

JURISDICTION

The jurisdiction of this Court is invoked under the provisions of Title 28, U. S. Code, Section 1257(3). The validity of the following state statute and municipal ordinance *as applied in this case* is drawn in question on the ground that as so applied they are repugnant to the Constitution of the United States:

(1) The Pennsylvania Act of June 20, 1947, P. L. 745 (24 Purdon's Statutes Secs. 582.1 *et seq.*)—This Act imposes in behalf of Pennsylvania school districts of the first class a temporary mercantile license tax on wholesale and retail vendors of goods, wares and merchandise. The tax for each year is measured by the gross receipts of the taxpayer for the preceding calendar year, and while the Act itself provides that no tax may be levied or collected on any portion of any business not within the taxing power of the Commonwealth under the Constitution of the United States, the statute *as applied by the Court below* is measured in this case by the gross proceeds of sales in interstate commerce in violation of Article I, Section 8, of the Constitution.

(2) City of Pittsburgh Ordinance No. 488 of 1947. (R. 15a-25a). This ordinance imposes a city mercantile license tax on wholesale and retail vendors of goods, wares and merchandise. The tax for each year is measured by the gross receipts of the taxpayer for the preceding calendar year. The tax imposed upon petitioner by this ordinance, *as applied by the Court below,* is measured by the gross proceeds of sales in interstate commerce in violation of Article I, Section 8, of the Constitution.

The decision of the Supreme Court of Pennsylvania entered on June 26, 1953, is sought to be reviewed by the within Petition.

Petitioner relies for jurisdiction on the principle that where the question of the validity under federal law of a state statute, *as construed and applied,* has been presented for decision or has been decided by the highest court of a state, this Court will take jurisdiction under Title 28, U.S. Code, Section 1257(3). See *Wilson v. Cook,* 327 U.S. 474, 480, 66 S. Ct. 663, 666 (1946), and cases therein cited.

It is contended that the questions involved are substantial for the reasons set forth *infra* for the allowance of the Writ of Certiorari.

The federal question here sought to be reviewed was first raised by petitioner in its petition for appeal from the tax assessment involved and was argued before the trial judge. In his opinion (R. 40) the trial judge stated that "an exhaustive search of authorities has shown that this factual situation has never been presented for decision by the United States Supreme Court". The trial court concluded (R. 51) that the transactions in question "constituted business in interstate commerce", but that because no state other than Pennsylvania could impose excise taxes measured by gross receipts upon the transactions, the mercantile taxes appealed from did not contravene Article I, Section 8, of the Constitution.

Petitioner filed exceptions (R. 13) to the decree *nisi* of the trial judge, again raising the question of constitutionality. These exceptions were argued before the court *en banc,* and in its Opinion (R. 66) said court

agreed with the trial court that the disputed sales were in interstate commerce and held that, although the taxes hence were directly on interstate commerce, they did not violate the federal Constitution.

Petitioner again raised the Constitutional question on appeal to the Supreme Court of Pennsylvania from the decree of the court *en banc*, and that Court in its opinion (R. 88-90) held that while the transactions as a whole were in interstate commerce, the tax was valid under the federal Constitution on the basis of certain decisions of this Court cited in that opinion.

QUESTIONS PRESENTED

1. Whether the Pennsylvania statute (Act of June 20, 1947, P. L. 745, as amended) imposing a school mercantile license tax upon the privilege of carrying on locally the business of selling goods, wares and merchandise violates Article I, Section 8, of the Constitution of the United States to the extent that the tax imposed by said Act is measured by the gross proceeds of sales in interstate commerce.

2. Whether ordinance No. 488 of 1947 of the City of Pittsburgh enacted pursuant to authority contained in the Pennsylvania Act of June 25, 1947, P. L. 1145, imposing a mercantile license tax upon the privilege of carrying on locally the business of selling goods, wares and merchandise violates Article I, Section 8, of the Constitution of the United States to the extent that the tax imposed by the said ordinance is measured by the gross proceeds of sales in interstate commerce.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT OF CERTIORARI

1. The decision of the Court below is in conflict with applicable decisions of this Court which hold that local taxes imposed upon the privilege of engaging in business activities violate Article I, Section 8, of the Constitution of the United States to the extent said taxes are measured by the gross receipts of sales in interstate commerce.

2. The decision of the Court below is in conflict with applicable decisions of this Court which hold that the local taxation of gross receipts from interstate commerce is unconstitutional without regard to whether the interstate transactions from which the receipts are derived are subject to taxation by other states.

3. The decision of the Court below, if permitted by this Court to stand, will establish the obviously unsound constitutional principle that payment of a local Pennsylvania tax may be made a condition to the exercise in Pennsylvania of the privilege of engaging locally in interstate commerce.

4. The decision of the Court below subjects the constitutionally-protected privilege of engaging locally in interstate commerce to local taxation.

Respectfully submitted,

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The Opinions of the Court of Common Pleas of Allegheny County, Pennsylvania were filed on February 20, 1952 and October 29, 1952, respectively. These Opinions were not officially reported, but are included in the record certified to this Court (R. 37; R. 54).

The Opinion of the Supreme Court of Pennsylvania was filed on June 26, 1953 and is officially reported at 374 Pa. 323. This Opinion is also included in the record certified to this Court (R. 85).

JURISDICTION

The judgment sought to be reviewed is a final judgment of the Supreme Court of Pennsylvania, *affirming* in part a decision of the Court of Common Pleas of Allegheny County, Pennsylvania. The jurisdiction of this Honorable Court is invoked under Title 28, United States Code, Section 1257 (3).

STATEMENT OF THE CASE

The essential facts are recited in the Petition under the caption "Summary Statement of the Matter Involved" (see pages 2 to 8, *supra*) and therefore are not repeated in this brief.

SPECIFICATION OF ERRORS TO BE URGED

The Supreme Court of Pennsylvania erred in the following particulars:

1. In failing to follow the applicable decisions of this Court which hold that local privilege taxes may not be imposed upon the gross receipts of transactions in interstate commerce.

2. In ruling that Article I, Section 8 of the Constitution of the United States does not prohibit the City and School District of Pittsburgh from imposing their mercantile license taxes upon the gross proceeds of the interstate sales made by Keystone to Westinghouse and National.

3. In holding that the local taxation of gross receipts from sales in interstate commerce is unconstitutional only where such interstate sales are subject to taxation by other states.

4. In applying to this case decisions of this Court holding that Article I, Section 8 of the Constitution of the United States does not prohibit the local taxation of intrastate activities merely because such activities have incidental interstate attributes.

SUMMARY OF THE ARGUMENT

It has been established that the sales by Keystone to Westinghouse and National are sales in interstate commerce (R. 51, 67, 88). It has also been established that the mercantile license taxes of the City and School District of Pittsburgh are taxes imposed upon the privilege of engaging in local business activities: *Federal Drug Company v. Pittsburgh*, 358 Pa. 454, 57 A. 2d 849 (1948). The sole question presented for decision, therefore, is whether a local tax imposed upon the privilege of engaging locally in interstate commerce and measured by the gross receipts from such commerce violates the "commerce clause" of the United States Constitution. This Court has previously decided this question in a number of cases, holding that a local privilege tax may not be imposed upon the gross receipts of sales in interstate commerce. The court below erred in failing to follow these cases.

The two grounds on which the court below based its decision are without merit. The court erroneously

applied the so-called multiple burden theory and held that even though the sales involved were sales in interstate commerce, the City and School District could tax the gross proceeds of such sales since no other state could impose a tax upon the transactions. This Court put an end to the multiple burden theory in *Freeman v. Hewit*, 329 U.S. 249, 67 S. Ct. 274 (1946), wherein it was held that the imposition of a local privilege tax upon the gross receipts of sales in interstate commerce is a direct tax on interstate commerce and therefore unconstitutional.

As the second ground for its decision the court below erroneously followed decisions of this Court holding that a state is not prohibited from taxing intrastate transactions merely because such transactions have incidental interstate attributes. These decisions have no application to the case here where the transactions involved are not intrastate in character but are entirely in interstate commerce.

ARGUMENT

I. The court erred in failing to follow the applicable decisions of this Court which hold that local privilege taxes may not be imposed upon the gross receipts of transactions in interstate commerce by ruling that Article I, Section 8, of the Constitution of the United States does not prohibit the City and School District of Pittsburgh from imposing their mercantile license taxes upon the gross proceeds of the interstate sales made by Keystone to Westinghouse and National.

The present case has now been before the courts of Pennsylvania for consideration on three separate occasions. In the process, the wheat has been separated from the chaff and certain legal conclusions which were originally in issue have now become firmly established. It might be advisable before beginning a discussion of the issues here involved to briefly summarize these established legal principles so as to sharply define the precise question which is presented to this Court.

The first legal principle so established by the Pennsylvania courts is that the sales of copper scrap by Keystone to Westinghouse and National were sales in interstate commerce. The trial judge so found in his conclusions of law (R. 51) and both the lower court *en banc* and the Supreme Court of Pennsylvania have recognized the validity of this legal conclusion (R. 67; R. 88).

A second legal principle having a bearing on the question presented here which is now firmly fixed is that the mercantile license taxes imposed by the City and School District are taxes on the privilege of carrying on the business of selling goods and merchandise. This legal

conclusion was made by the Court *en banc* on the basis of *Federal Drug Company v. Pittsburgh,* 358 Pa. 454, 57 A. 2d. 849 (1948) (R. 64). See also *Allegheny County Motor Co. v. Pittsburgh,* 360 Pa. 407, 62 A. 2d. 64 (1948); *Blauners, Inc. v. Philadelphia,* 330 Pa. 340, 198 A. 889 (1938) and *Puntureri v. Pittsburgh School District,* 359 Pa. 596, 60 A. 2d. 42 (1945) wherein it was said (p. 599):

> "* * * the mercantile license tax * * * is a tax on the privilege of selling goods and merchandise of any kind and nature whatsoever, and * * * is measured by the gross volume of business transacted annually".

Therefore, it having been established that the transactions involved here between Keystone and Westinghouse and National were sales in interstate commerce and that the mercantile license taxes imposed by the City and School District are taxes on the privilege of carrying on local business activities, the sole question presented to this Court may be stated as follows: Is a local tax, imposed upon the privilege of engaging locally in interstate business activities, measured by the gross receipts from such interstate activities, unconstitutional, as being in violation of Article I, Section 8, of the Constitution of the United States? This question is not a new one. It has been before this Court on a number of occasions and in every case has been answered in the affirmative.

In *Crew Levick Co. v. Pennsylvania,* 245 U.S. 292, 38 S. Ct. 126 (1917), the tax involved was the mercantile license tax imposed by the Commonwealth of Pennsylvania under the Act of May 2, 1899, P.L. 184, a tax identical with the present taxes imposed by the City and

School District. It was held by this Court, in that case, that the tax was unconstitutional insofar as it was measured by the gross receipts from merchandise shipped from Pennsylvania to foreign countries. Although that case involved foreign sales, it applies with equal force to gross receipts from interstate sales, the Court having pointed out in its opinion that as far as the issue there involved was concerned, it made no difference whether the commerce was foreign or merely interstate and that a state privilege tax such as this, measured to any extent by gross receipts of either foreign or interstate commerce, was invalid. *It is submitted that the Crew Levick case is controlling on the present case.*

In *Gwin, White & Prince v. Henneford,* 305 U.S. 434, 59 S. Ct. 325 (1939), the State of Washington imposed "a tax for the act or privilege of engaging in business activities" upon every person "engaging within this state in any business activity". In determining the tax liability of the plaintiff, the taxing authorities included in its gross volume of business, on which the tax was measured, gross receipts from sales of fruit shipped from Washington to various out-of-state destinations. This Court held that the tax was invalid insofar as it was measured by the gross receipts of these interstate sales.

J. D. Adams Manufacturing Co. v. Storen, 304 U.S. 307, 58 S. Ct. 913 (1938), involved the Indiana gross income tax, which tax was characterized by the Attorney General of Indiana as a privilege tax upon the receipt of gross income. It was held in that case that the tax was unconstitutional insofar as it was imposed on taxpayer's gross income from sales in interstate and foreign commerce.

Freeman v. Hewit, 329 U.S. 249, 67 S. Ct. 274 (1946), is a more recent decision involving the same tax dealt with in the *Adams* case. It was there expressly held that the imposition of the tax on the gross receipts of sales of securities made in interstate commerce was in violation of the "commerce clause" of the Constitution of the United States.

The Pennsylvania Supreme Court held that the above cases had no application to the present question because in all those cases the sellers and buyers were from different states while here the sellers and buyers are both residents of Pennsylvania. It is our contention that the residence of the parties to a transaction in interstate commerce is not material to the question of whether a state is prohibited by the Constitution from taxing the proceeds of the transaction or measuring the tax by the amount of such proceeds.

The Pennsylvania court has confused the question of whether a state has the right to impose a tax on a transaction in interstate commerce *with the closely allied question of whether the transaction is one in* intrastate commerce *and for that reason not outside the purview of the state's taxing powers.* Undoubtedly the residence of the parties to a sale of goods is one of the factors which must be considered in determining whether a transaction constitutes a sale in intrastate commerce or one in interstate commerce. However, once this determination has been made, the residence of the parties is of no further significance. The sole question then becomes one of constitutional powers to which the residence of the parties involved in the transaction in question has no relevance.

In drawing a distinction between the present case and the cases cited above based on the residence of the parties to the transaction involved, the court below is in effect saying that while the transactions in the present case and in the cited cases are all in interstate commerce, the transactions in the above cases have more of an interstate character than those involved here and for that reason those cases do not serve as precedent. Such reasoning is clearly erroneous. This Court has never recognized *degrees* of interstate commerce, the application of the "commerce clause" being difficult enough without attempting to divide interstate transactions into various categories and applying different rules to each category. Although the transactions in the present case, because of the residence of the parties concerned, may have less of an interstate character than those in the other cases, they are nevertheless, as found by the court below, sales in interstate commerce and the basic principles set forth in the cited cases must be applied to them. Those cases hold that local taxes imposed upon the privilege of doing business locally cannot be measured by the gross proceeds of sales in interstate commerce. The decision of the Pennsylvania Supreme Court holding that the privilege taxes imposed by the City and School District may be measured by the gross proceeds of the interstate sales of copper scrap to Westinghouse and National is in direct conflict with those cases.

II. The court erred in holding that the local taxation of gross receipts from sales in interstate commerce is unconstitutional only where such interstate sales are subject to taxation by other states.

The Pennsylvania court's decision was based on two separate grounds, which we shall consider in turn. First, the court adopted the so-called multiple burden theory on which the Allegheny County court based its decision (R. 90-91).

There is no authority to support the multiple burden theory as applied by the court below, i.e., that the local taxation of gross receipts from interstate commerce is constitutionally valid where the transaction in interstate commerce is not possibly subject to tax by another state. The cases of *J. D. Adams Manufacturing Co. v. Storen, supra, Gwin, White & Prince v. Henneford, supra,* and *Western Live Stock v. Bureau of Revenue,* 303 U.S. 250, 58 S. Ct. 546 (1938) are relied on in support of this theory. True, those cases state, in no uncertain terms, that the evil of a tax measured by the gross receipts from interstate commerce is that if one state is free to tax such commerce then every state which such commerce touches may levy a tax upon it, and thus interstate commerce becomes subject to multiple tax burdens. Those cases go no further. They do not directly hold, as did the court below, that gross receipts from interstate commerce may be taxed by a state if no other state can possibly tax such commerce; nor does any case so hold. Admittedly, the statements in those cases are susceptible to such an inference. They are equally susceptible to the interpretation that because of the inherent risk of multiple taxation of the fruits of interstate commerce, the taxation of the

gross receipts from interstate commerce will be deemed invalid as a direct tax on such commerce and *no* state will be permitted to impose a tax upon such receipts.

This Court in *Freeman v. Hewit, supra,* left no doubt as to which of these two interpretations is the correct one. There, applying the same tax statute that was involved in the *Adams* case, to an almost identical set of facts, the Court refused to place its decision on the ground that a local privilege tax measured by the gross receipts from sales in interstate commerce is invalid only if some other state can possibly tax such commerce (as was vigorously urged by Justice Rutledge in his concurring opinion) but rested its decision squarely on the ground that a privilege tax imposed upon the gross receipts of interstate sales is absolutely prohibited as a direct tax on interstate commerce. The basis of this Court's decision is clearly brought out in the following excerpts from its opinion:

"* * * In two recent cases we applied the principle that the Commerce Clause was not merely an authorization to Congress to enact laws for the protection and encouragement of commerce among the States, *but by its own force created an area of trade free from interference by the States.* In short, the Commerce Clause even without implementing legislation by Congress is a limitation upon the power of the States. * * * (Emphasis supplied) (329 U.S. at 252)

* * * * * * *

"* * * To extract a fair tithe from interstate commerce for the local protection afforded to it, a seller State need not impose the kind of tax which Indiana here levied.

"As a practical matter, it can make such commerce pay its way * * * apart from taxing the very sale. Thus, it can tax local manufacture even if the products are destined for other states. * * *

"* * * While these permitted taxes may in an ultimate sense, come out of interstate commerce, they are not, *as would be a tax on gross receipts, a direct imposition* on that very freedom of commercial flow which for more than a hundred and fifty years has been the ward of the Commerce Clause. (Emphasis supplied) (329 U.S. at 255-56).

* * * * * * *

"It is suggested, however, that the validity of a gross sales tax should depend on whether another State has also sought to impose its burden on the transactions. If another State has taxed the same interstate transaction, the burdensome consequences to interstate trade are undeniable. But that, for the time being, only one State has taxed is irrelevant to the kind of freedom of trade which the Commerce Clause generated. The immunities implicit in the Commerce Clause and the potential taxing power of a State can hardly be made to depend, in the world of practical affairs, on the shifting incidence of the varying tax laws of the various States at a particular moment. Courts are not possessed of instruments of determination so delicate as to enable them to weigh the various factors in a complicated economic setting which, as to an isolated application of a State tax, might mitigate the obvious burden generally created by a direct tax on commerce. *Nor is there any warrant in the constitutional principles hereto-*

*fore applied by this Court to support the notion that a State may be allowed one single tax-worth of direct interference with the free flow of commerce. * * *"* (Emphasis supplied) (329 U.S. at 256).

III. The court erred in applying to this case decisions of this Court holding that Article I, Section 8 of the Constitution of the United States does not prohibit the local taxation of intrastate activities merely because such activities have incidental interstate attributes.

As the second ground for its ruling, the Pennsylvania Supreme Court held that the case here was governed by the following decisions of this Court: *International Harvester Co. v. Department of Treasury,* 322 U. S. 340, 64 S. Ct. 1019 (1944); *Department of Treasury of Indiana v. Wood Preserving Corporation,* 313 U.S. 62, 61 S. Ct. 885 (1941); *Wiloil Corporation v. Commonwealth of Pennsylvania,* 294 U.S. 169, 55 S. Ct. 358 (1935); *McGoldrick v. Berwind-White Coal Mining Co.,* 309 U.S. 33, 60 S. Ct. 388 (1940); *Interstate Oil Pipe Line Co. v. Stone,* 337 U.S. 662, 69 S. Ct. 1264 (1949); *Norton Company v. Department of Revenue of Illinois,* 340 U.S. 534, 71 S. Ct. 377 (1951); *Western Live Stock v. Bureau of Revenue* 303 U.S. 250, 58 S. Ct. 546 (1938). (R. 88-89) Analysis of the above cases reveals that the transactions therein involved can be placed into three different categories. The nature of the transactions now under consideration is entirely different from that of the transactions in each of these three categories. For that reason, the cases cited by the Pennsylvania court have

no application to the question that was before that court.

Cases in the first category, such as the *Wood Preserving* case, involve the situation where the seller makes delivery of goods to the buyer, or his agent, within the jurisdiction of the taxing state and the buyer after receiving the goods ships them to a point outside the state. In that situation there are two separate and distinct transactions, one wholly intrastate in character followed by one in interstate commerce. The first transaction on which the tax is imposed is entirely completed within the jurisdiction of the taxing state before the second transaction involving interstate commerce begins. Obviously, this is completely different from the situation here where there is but a single transaction and it is one in interstate commerce.

The court below attempting to put the Keystone sales to Westinghouse and National into the above category stated that the effect of such sales was the same as if Keystone had delivered copper scrap to Westinghouse and National in Pittsburgh and these purchasers had then shipped it to the refinery in New Jersey; that the purpose of making shipment direct to the refinery was merely a "short-cut". Nothing could be farther from the facts. It was contemplated by the parties to these sales that the sale was to be complete only when the scrap delivered was assayed and analyzed at the refinery. (R. 8). Upon the assay and analysis of each shipment at the refinery such of the scrap as came up to specification was to be accepted on behalf of Westinghouse or National and the price of such scrap was then to be finally determined (R. 7, 8). If the

scrap failed to meet specifications, it would be rejected and there would be no sale. Delivery of the scrap to the refinery for assay and analysis was the paramount feature of the sale, not a mere "short-cut" for the convenience of Westinghouse and National occurring after the completion of an intrastate sale as the court below suggested. Westinghouse and National would not even have considered purchasing and taking delivery of the scrap in Pennsylvania before refinery analysis and then shipping it to the refinery for use in the performance of their respective contracts with American Smelting Company.

The fact situation in the cases in the second category reduced to its simplest terms was this: The seller, either a resident of or doing business in the taxing state, and the buyer made a contract for the sale of goods calling for delivery of the goods to the buyer within the taxing state. The seller then caused the goods to be delivered from a source outside the state directly to the buyer within the state.

In these cases the manner in which the seller arranged for delivery of the goods was immaterial to the performance of the contract of sale. The buyer was concerned only with receiving the goods at his place of business within the taxing state. It made no difference to him whether the goods came from the seller's stock within the state or directly from a source outside the state. Thus the transaction was purely and simply an intrastate sale. Interstate commerce was only incidentally involved because the seller for his own convenience chose to cause the goods to be shipped directly to the buyer from outside the state.

The situation here is quite to the contrary. Delivery of the goods by the seller directly to New Jersey was not merely incidental to the sale but, as pointed out above, was the most important part of the sale. Such delivery was not for the convenience of either seller or purchaser, but was essential to the consummation of the sale.

Cases in the third category, of which *Western Live Stock v. Bureau of Revenue, supra,* is a typical example, are all cases where the tax imposed upon a local activity carried on wholly within the taxing jurisdiction which was separate and distinct from sales in interstate commerce incident to the carrying on of such local activity. Thus, in the *Western Live Stock* case, the Court held that the State of New Mexico could constitutionally impose a tax on the local business of printing a magazine even though the magazine was sold to subscribers outside New Mexico because, in the words of the Court (303 U.S. at 258):

> "* * * the business of preparing, printing and publishing magazine advertising is peculiarly local and distinct from its circulation whether or not that circulation be interstate commerce. * * *"

In the case before the Court there is no local activity which is separate and distinct from the interstate sales to Westinghouse and National. Although one step of each of such sales takes place in Pittsburgh, these sales are single, integrated transactions which cannot be broken into two separate and distinct parts, one part purely intrastate commerce in character and the other in interstate commerce.

IV. Conclusion.

It is submitted that the Supreme Court of Pennsylvania in upholding the mercantile license taxes of the City and School District of Pittsburgh as applied to the gross receipts from the sales by Keystone to Westinghouse and National completely misapplied the decisions of this Court and that the Pennsylvania court's decision is therefore in conflict with the applicable decisions of this Court.

Further, the decision below opens the field of interstate commerce to a multiplicity of local municipal taxes both in Pennsylvania and in other states. For example, in Pennsylvania alone there are at the present time approximately thirty local mercantile taxes in effect, and the trend to this type of privilege tax has been spreading nationwide. Before the "commerce clause" of the Constitution of the United States has been completely emasculated a definitive barrier must be erected by this Court.

Respectfully submitted,

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Office-Supreme Court, U.
FILED
OCT 22 1953
HAROLD B. WILLEY, Cl

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

NO. 369

KEYSTONE METAL COMPANY, Petitioner,

v.

CITY OF PITTSBURGH, JAMES P. KIRK, Treasurer of the City of Pittsburgh, SCHOOL DISTRICT OF PITTSBURGH, et al., etc., Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INDEX TO BRIEF.

		PAGE
1.	This Is Not a Case In Which Petitioner May Properly Invoke the Jurisdiction of This Court	1
2.	The Petition Discloses No Exceptional Circumstances Whatsoever	2
3.	The Questions Presented by Petitioner Do Not Portray the True Factual and Legal Situation	3
4.	Petitioner Does Not Present a Federal Question of Substance Which Has Not Heretofore Been Determined by This Court	8
	a. The Commerce Clause Does Not Prohibit the Tax Imposed	10
	b. Interstate Commerce May Be Made to Pay Its Own Way	12
	(1) The Supreme Court of Pennsylvania Properly Decided This Question	12
	(2) No Tax Upon the Transaction by a Sister State Would Be Related to the Sales Transaction Upon Which Alone the Instant Taxes Are Based	16
	(3) The Questions Are Not of First Impression in This Court	19
Conclusion		22

TABLE OF CASES

J. D. Adams v. Storen, 304 U.S. 307, 58 S. Ct. 913 (1938) 7

Capital Greyhound Lines v. Brice, 339 U.S. 542, 70 S. Ct. 808 (1950) 9, 10

Central Greyhound Lines v. Mealey, 334 U.S. 658, 68 S. Ct. 1263 20

PAGE

City of Chicago v. Willett Co., ... U.S. ...., 73 S. Ct. 460 (1953) 21

Crew Levick Co. v. Pennsylvania, 245 U.S. 292 (1917) 7

Freeman v. Hewit, 329 U.S. 249, 67 S. Ct. 274 (1947) 7, 10, 11, 12, 17, 20, 21

Gwin, White & Prince v. Henneford, 305 U.S. 434, 59 S. Ct. 325 (1939) 7, 21

International Harvester Co. v. Dept. of Treasury, 322 U.S. 340, 64 S. Ct. 1019 (1944) 12, 13, 20

Interstate Oil Pipe Line Co. v. Stone, 337 U.S. 662, 69 S. Ct. 1264 (1949) 16, 18, 20

Keystone Metal Co. v. City of Pittsburgh, 374 Pa. 323, 97 A. 2d 797.....7, 12

Lawrence v. State Tax Commission, 286 U.S. 276 (1932) 16

McCleod v. J. E. Dilworth Co., 322 U.S. 327, 64 S. Ct. 1023 (1944) 8, 12

McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33, 60 S. Ct. 388 (1940) 11

Norton v. Dept. of Revenue of Illinois, 340 U.S. 534, 71 S. Ct. 377 (1951) 13, 18, 19, 20

Puntureri v. School District of Pittsburgh, 359 Pa. 596, 60 A. 2d 42 (1948) 6

Robertson v. People of State of California, 328 U.S. 440, 66 S. Ct. 1160 21

Spector Motor Service v. O'Connor, 340 U.S. 602, 71 S. Ct. 508 (1951) 14, 20

PAGE

State of Wisconsin v. J. C. Penney Co., 311 U.S. 435, 61 S. Ct. 246 (1940) 14, 15, 21

Western Livestock v. Bureau of Revenue, 303 U.S. 250, 58 S. Ct. 546 (1938) 11, 13, 14, 17, 20

TABLE OF STATUTES.

Act of June 20, 1947, P.L. 745 .....3, 4, 5

Ordinance No. 488, of 1947, City of Pgh. 3, 4, 5

MISCELLANEOUS.

United States Constitution, Art. I, Sec. 8, Cl. 3 .....5, 7, 9, 10, 11, 12, 13, 14, 15

United States Constitution, Art. I, Sec. 10, Cl. 2 .....5, 7, 12, 15

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents respectfully submit that the prayer of the Petition for Writ of Certiorari should not be granted, for the following reasons:

1. This is not a case in which petitioner may properly invoke the jurisdiction of this Court.

Petitioner did, indeed, raise the question in the trial court, the court *en banc* and the Supreme Court of Pennsylvania. The same action has been taken by scores of other taxpayers who have asserted complete or partial non-liability for the mercantile taxes of the School District of Pittsburgh under an Act of Assembly and the City of Pittsburgh under a City Ordinance. In all cases, as in this, the local (Allegheny County) and Appellate Courts, regardless of their decisions, have, as will be shown more specifically hereinbelow, considered

the constitutional question thus raised. In so doing, they have considered, in the light of constitutional provisions, congressional enactments and decisions of this Court, whether or not in the individual case, these local taxes imposed an undue or prohibited burden upon or interference with interstate commerce.

Respondents do not question the general principle that this Court, in the exercise of its discretion, takes jurisdiction where the validity of a state statute under federal law, as construed and applied by the highest court of a state is challenged. Respondents submit, however, that under the decisions of this Court, such discretionary acceptance of jurisdiction will be made only in proper cases, such as, *inter alia*:

a. exceptional circumstances;

b. where jurisdiction appears affirmatively upon the record;

c. where a federal question of substance, not theretofore determined by this Court, is involved.

For reasons like these such discretionary power will be sparingly exercised.

2. The petition discloses no exceptional circumstances whatsoever.

Whether or not jurisdiction appears affirmatively upon the record requires no extended discussion inasmuch as the record speaks for itself; Respondents submit that it does not. Respondents further submit that the petition submits no federal question of substance not heretofore determined by this Court. Consequently,

Respondents submit that this Court cannot herein take jurisdiction, wherefore the petition should be dismissed. The argument which follows attempts to support Respondents' position.

3. The Questions Presented (two in number) by petitioner do not fully and accurately portray the true factual and legal situation.

Both questions are essentially the same in substance, Number 1 referring to the School Mercantile Tax Act, No. 320, of June 20, 1947, P.L. 745, made permanent upon re-enactment in 1949; whereas Number 2 relates to the City Mercantile Tax Ordinance, No. 488 of December, 1947, enacted under authority of the Pennsylvania Municipal Enabling Act of June 25, 1947, P.L. 1145. Except for two differences in the provisions of the Act and Ordinance which are in no respect material to the issues herein raised, the two enactments are substantially identical.

The School Mercantile Tax Act contains the following provisions pertinent to the instant issues:

> "Section 2. Authority to Levy and Collect Tax; Use of Tax. — For the year one thousand nine hundred forty-eight and annually thereafter, every school district of the first class shall issue mercantile licenses and levy and collect an annual mercantile license tax in the manner and at the rates hereinafter set forth."

Section 2 of the City Mercantile Tax Ordinance is the same.

"Section 3. License Fees. — Beginning in the year one thousand nine hundred forty-eight, and annually thereafter, every person desiring to continue to engage in, or hereafter to begin to engage in, the business of wholesale or retail vendor of, or dealer in, goods, wares and merchandise and broker conducting a restaurant or other place where food, drink or refreshments are sold, or place of amusement in a school district of the first class, shall on or before the first day of January of each license year, or prior to commencing business in any such license year, procure a mercantile license for his place of business, or if more than one, for each of his places of business in the school district from the receiver of school taxes or school treasurer, who shall issue the same upon the payment of a fee of two dollars ($2) for a wholesale license or a retail license, and four dollars ($4) for a wholesale and retail license for his place of business, or if more than one, for each of his places of business in the school district for each license year. Such license shall be conspicuously posted at the place of business or each of the places of business of every such person at all times."

Section 3 of Mercantile Tax Ordinance is identical.

"Section 12 * * *

(b) Nothing contained in this act shall be construed to empower any school district of the first class to levy and collect the taxes hereby imposed on any person or on any business or any portion of any business not within the taxing power of this

Commonwealth under the Constitution of the United States.

"(c) If the tax, * * * or any portion of the tax imposed upon any person under the provisions of this act shall be held by any court of competent jurisdiction to be in violation of the Constitution of the United States, or of the Commonwealth of Pennsylvania, the decision of the court shall not affect or impair the right to impose the taxes, or the validity of taxes so imposed upon other persons as herein provided, or to impose the taxes so excepted from imposition. It is the intent of the General Assembly that the taxes imposed or excepted, so held to be unconstitutional, were not to be imposed or excepted, but that the remainder of said taxes imposed hereunder were to be imposed and collected and the taxes so excepted were to be imposed."

These provisions appear in Section 11 of the Mercantile Tax Ordinance.

When the questions presented (Petition, page 11) are compared with paragraphs (1) and (2) of the Petition, the bases of the questions presented become evident. It is made to appear that the court below, without more, upheld the tax as applied to Petitioner notwithstanding the sales were made in interstate commerce. This is an unwarranted conclusion.

It is important to note *who* is taxed and *what* is taxed. The impact of the tax imposed by the Act and the Ordinance is on *dealers or vendors*. It is an excise tax based on the *privilege of selling* within the territorial jurisdictions of the School District and the City, which

are co-terminous. *Puntureri v. School District of Pittsburgh,* 359 Pa. 596, 60 A. 2d. 42 (1948).

Petitioner is located, and exercises the privilege of selling within the territorial limits of both Respondents, where it enjoys and may claim all the privileges, protection and benefits within the power of either Respondent to confer. The two customers of Petitioner, transactions with whom are involved exclusively in the instant case, are likewise and similarly located and doing business in Pittsburgh. All details, except physical delivery, of *selling* and *buying* non-ferrous metal between Petitioner and these customers were negotiated and determined in Pittsburgh. Thus the "privilege of selling", *the thing taxed,* was completely consummated, irrespective of actual physical delivery, in the Pittsburgh offices of Petitioner and its customers. Such local transactions and contracts are not in the least affected by the fact that the customers wanted and purchased refined non-ferrous metal, which Petitioner did not have here and could not deliver without first purchasing proper scrap and arranging for its refinement. They are equally unaffected by the fact that Petitioner acquired such scrap either within or without Pennsylvania and ordered it delivered to Cartaret, New Jersey, for assaying and refinement prior to delivery to the customer. It all adds up to a transaction in the course of exercising the privilege of selling — the only thing taxed as measured by the gross receipts therefrom — initiated, negotiated and concluded within the territorial limits of the School District and City of Pittsburgh. Only the transportation of the scrap occurs elsewhere: where initiated in another State and coming to rest in New Jersey, it may never be any where, any time, in Pennsylvania.

The true question then emerges: where the selling transaction (the thing taxed) is made in such complete and exclusively local fashion though accompanied by undoubted interstate transportation of goods probably never in Pennsylvania, are the receipts therefrom not "within the taxing power of this Commonwealth under the Constitution of the United States"?

The gist of Petitioners' argument is now, as it was in the courts below, that any gross receipt tax based on transactions *touched* by inter-state commerce in any manner is *per se* invalid, relying on *Crew Levick Co. v. Pennsylvania,* 245 U.S. 292 (1917), *Gwinn-White and Prince v. Henneford,* 305 U.S. 439 (1939), *J. D. Adams v. Storen,* 304 U.S. 307 (1938) and *Freeman v. Hewit,* 329 U.S. 249 (1947). When the *facts* rather than isolated *statements* in those opinions are properly discerned, it is clear as the Supreme Court of Pennsylvania found, *Keystone Metal Co. v. City of Pittsburgh,* 374 Pa. 323, 97 A.2d. 797 at page 801, that these

> "were all cases in which the sellers and the buyers were from *different* states, and the transactions involved the *negotiation of business* across State lines. Obviously in those situations there were not *sufficient local incidents* to support the tax." (Emphasis supplied).

At the same time the Court below found, 97 A.2d. 707 at page 800, that in the instant case

> "The consummation of these entire transactions, with the sole exception of delivery, was within the borders of Pennsylvania."

Of necessity, State and Federal taxation, in so far as it concerns commerce among the States, must intersect at some point, inasmuch as they do not move in "wholly different orbits"; *McLeod v. J. E. Dilworth Co.*, 322 U.S. 327, 329, 64 S. Ct. 1023 (1944).

Furthermore, Petitioner's argument before the trial court, the court *en banc*, and the Supreme Court of the State, if not now, has asserted at least by inference that the tax under the Mercantile Tax Act, and the Ordinance, is void as being measured by unapportioned gross proceeds of sales in interstate commerce. That argument misses the issue. Apportionment or non-apportionment is not involved. There is nothing on which apportionment can operate. In this case, as in others, Respondents do not impose the tax in situations where it would be a direct tax on, or discrimination against, interstate commerce. There has been no attempt to tax Petitioner's sales or other activities outside of Pennsylvania. Had Petitioner's customers been in Ohio or New Jersey, and not in Pittsburgh, Respondents would readily have treated Petitioner as exempt, as is done in countless other instances.

4. Petitioner does not present a federal question of substance which has not heretofore been determined by this Court.

Conceding readily that a *direct* tax on gross receipts from interstate commerce is invalid as is a tax *discriminating against* interstate commerce, Respondents urgently submit that the School District and City mercantile taxes are not subject to challenge on either ground. Their impact on interstate commerce is in no sense direct;

neither do they in any sense whatsoever discriminate either in favor of local commerce or against interstate commerce. As shown above, the *thing taxed* is nothing but the *exercise in* the coterminous territorial jurisdictions of the School District and the City of the *privilege of selling*. The exercise of that privilege *outside* of those limits—in any suburb, in Allegheny County and in the State—is not within Respondents' reach. But where the exercise of that privilege *within* those limits results in gross receipts from customers *outside* of those limits, such receipts are within Respondents' tax reach, even though interstate commerce is incidentally involved. If in this situation the taxes complained of are direct or discriminatory with respect to interstate commerce, Petitioner has failed all along to prove it, notwithstanding the burden of proof rests heavily upon it. It is hornbook law that tax statutes must be strictly construed against him who challenges it. *Capital Greyhound Lines v. Brice*, 339 U.S. 542, 70 S. Ct. 806, 810.

Petitioner has at no time—and has not now—invoked the principle of due process. It now rests its argument on the proposition that the State Supreme Court erred by ruling the taxes as imposed to be valid, because, I, not *prohibited* by Article I, Section 8 of the Constitution of the United States (Petition, page 17); II (page 22) that local taxation of gross receipts from sales in interstate commerce is unconstitutional *only* where such interstate sales *are taxable* by other states; and III (page 25) that the Commerce Clause does not prohibit local taxation *merely* because intra-state activities have *incidental interstate attributes*. Respondents submit that Petitioner's analysis of the opinion of the State Supreme Court fails to

comprehend the true and complete *ratio decidendi* of that unanimous Court.

a. *The Commerce Clause does not prohibit the tax imposed under the Mercantile Tax Act or the Mercantile Tax Ordinance.* On its face the Commerce Clause simply reads "the Congress shall have power * * * to regulate commerce * * * among the several states." (Article I, Section 8, Clause 3). Respondents recognize the statement in *Freeman v. Hewit, supra,* to the effect that the Commerce Clause was not merely an authorization to Congress to enact laws for the protection and encouragement of commerce among the states, but by its own force created an area of trade free from interference by the states, so that the Commerce Clause, even without implementing limits by the Congress, is a limitation upon the power of the states. Nevertheless, this Court has recognized in numerous instances that a state tax may be valid provided it does not discriminate against, cast an undue burden upon, or, interfere directly with interstate commerce. While interstate commerce, as such, may not be discriminated against, it need not, on the other hand, be actively favored at the expense of local trade. All who share the protection and benefits of government may be asked to contribute uniformly to its upkeep. The State Supreme Court, recognizing the effect of the case of *Freeman v. Hewit, supra,* nevertheless held that if it is applied, it would, in this case, support the validity of the tax. Respondents submit that if a new rule prohibiting the imposition of these mercantile taxes consistent with Petitioner's contentions is to be declared, Congress should do it. *Capital Greyhound Lines v. Brice, supra.* This Court also stated in *Freeman v.*

Hewit decision that "Courts are not possessed of instruments of determination so delicate as to enable them to weigh the various facts in a complicated economic setting which, as to an isolated application of a state tax, might mitigate the obvious burden generally created by a direct tax on commerce." What this Court said in these words might equally well apply with respect to the burden upon interstate commerce which is not direct or discriminatory.

The basic meaning of the commerce clause has been phrased by the United States Supreme Court time and time again. The following expressions, from cases involving taxes of like operating incidence as the tax imposed by the Act and Ordinance here challenged, are typical:

> "But it was not the purpose of the commerce clause to relieve those engaged in interstate commerce of their just share of state tax burdens, merely because an incidental or consequential effect of the tax is an increase in the cost of doing business, *Western Livestock v. Bureau of Revenue,* 303 U.S. 250, 254, 58 S. Ct. 546 * * * Not all state taxation is to be condemned because, in some manner, it has an effect upon commerce between the states, and there are many forms of tax whose burdens, when distributed through the play of economic forces, affect interstate commerce, which nevertheless falls short of the regulation of the commerce which the Constitution leaves to Congress." *McGoldrick v. Berwind-White Coal Mining Co., supra,* 60 S. Ct. at p. 392, 309 U.S. 33 at page 46, 47.

"* * * neither the Commerce Clause or the Fourteenth Amendment prevent the imposition of tax on receipts from an intrastate transaction even though the total activities from which the local transaction derives may have incidental interstate attributes." *International Harvester Co. v. Department of Treasury, supra,* 64 S. Ct. at p. 1021, 322 U.S. 340 at page 344.

b. *Interstate Commerce may be made to pay its own way.*

(1) RESPONDENTS SUBMIT THAT THE SUPREME COURT OF PENNSYLVANIA PROPERLY DECIDED THIS QUESTION, NOT *merely* AS THE BASIS OF ITS DECISION IN THE CASE, BUT AS *one vital* FACTOR ALONG WITH OTHERS, WHEN IT SAID INTER ALIA, AT PAGE 799 OF 97 A. 2d, 797, WITH REFERENCE TO LOCAL INCIDENTS:

"(1) While it is quite clear that a direct State tax upon the privilege of conducting interstate commerce is invalid, Freeman v. Hewit, 329 U.S. 249, 67 S. Ct. 274, 91 L.Ed. 265; Joseph v. Carter & Weekes Stevedoring Co., 330 U.S. 422, 67 S. Ct. 815, 91 L.Ed. 993; Spector Motor Service, Inc., v. O'Connor, 340 U.S. 602, 71 S. Ct. 508, 95 L.Ed. 573, it has also been held by the Supreme Court of the United States that, although a transaction viewed as a whole may be one in interstate commerce, there may be certain "intrastate events", Southern Pacific Co. v. Gallagher, 306 U.S. 167, 176, 59 S. Ct. 389, 83 L.Ed. 586, or "local activities", McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33, 58, 60 S. Ct. 388, 84 L.Ed. 565, in connection therewith that permit the

imposition of a State tax. Western Live Stock v. Bureau of Revenue, 303 U.S. 250, 58 S. Ct. 546, 82 L.Ed. 823; International Harvester Co. v. Department of Treasury, 322 U.S. 340, 64 S. Ct. 1019, 88 L.Ed. 1313; Norton Company v. Department of Revenue of Illinois, 340 U.S. 534, 71 S. Ct. 377, 95 L.Ed. 517."

Emerging from the above citations and from many decisions of this Court which are of necessity divergent by reason of differing facts, it is crystal-clear upon proper analysis that the mere presence of interstate commerce —flow of goods across state lines—is neither decisive nor controlling in tax cases. The Commerce Clause has not been construed to prohibit states from making such commerce "pay its own way"—provided adequate local events or incidents to support the tax are present and if the tax does not discriminate against or otherwise burden such commerce.

That there are adequate local incidents or events to support the instant mercantile taxes has been adequately demonstrated, *supra*. In considering applicable decisions to support Respondents' contention that there are adequate local events distinct from interstate commerce to support the tax against Petitioner, Respondents suggest that the only cases directly in point are those where the thing taxed, or the privilege exercised, occurs in the taxing state, but some feature or the culmination of the underlying transaction occurs elsewhere.

Illustrative of this line of cases is the leading case of *Western Livestock v. Bureau of Revenue, supra*. The case involved a New Mexico privilege tax on gross receipts. The plaintiff printed a magazine in New Mexico.

Solicitation and circulation distribution were both in and out of New Mexico. Total receipts from both in and out of state sources were taxed by New Mexico. The Court in sustaining the tax held that the tax in form and substance was conditioned on local happenings, the local carrying on of printing and publishing. It noted that the tax could neither in form nor substance be repeated by another state so as to lay an added burden on interstate commerce. The Court said *inter-alia*:

> "It is not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of the state tax burden even though it increases the cost of doing business. 'Even interstate commerce must pay its own way' * * * and the bare fact that one is carrying on interstate commerce does not relieve him from many forms of state taxation which add to the cost of his business. In the present case the tax is, in form and substance, an excise conditioned on the carrying on of a local business." 303 U.S. at pp. 254, 257.

State of Wisconsin, et al., v. J. C. Penney Co., supra, also is characteristic of the line of cases where the underlying transaction taxed is concerned incidentally with events occurring without the taxing state. The case involved a Wisconsin state tax on the "privilege of declaring and receiving dividends out of income derived from property located and business transacted in Wisconsin." In respect to foreign corporations, as was the Penney Company, which had stores both in and out of Wisconsin, the law provided an allocation formula. The Penney Company declared dividends and drew dividends checks at its New York office. Since these events

occurred outside of Wisconsin, Penney contended that the dividends were protected by the commerce clause and that Wisconsin had no power to tax. In upholding Wisconsin's right to tax, this Court held that the tax in its measure and incidence was related to Wisconsin transactions even though contingent on events occurring elsewhere. The Court grounded its decision on the due process clause:

> "We cannot, however, be too often reminded that the limits on the otherwise autonomous powers of the states are those in the Constitution and not verbal weapons imported into it. 'Taxable event', 'jurisdiction to tax', 'business situs', 'extraterritoriality', are all compendious ways of implying the impotence of state power because state power has nothing on which to operate. These tags are not instruments of adjudication but statements of result in applying the sole constitutional test for a case like the present one. That test is whether property was taken without due process of law, or, if paraphrase we must, whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state. The simple but controlling question is whether the state has given anything for which it can ask return. The substantial privilege of carrying on business in Wisconsin, which has here been given, clearly supports the tax, and the state has not given the less merely because it has conditioned the demands of the exaction upon happenings outside its own borders. The fact that a tax is contingent upon events brought to pass without a state does not destroy the nexus between such a tax and transactions within a

state for which the tax is an extraction." 61 S. Ct. at p. 250, 311 U.S. 435, at pages 444 and 445.

Much in the same tenor as respecting a state's right to tax its residents measured by receipts from transactions occurring both with and without the taxing state is *Lawrence v. State Tax Commission,* 286 U.S. 276 (1932), a case relied on in the Penney decision.

Respondents submit that the Western Livestock and Penney cases are applicable in principle to the present situation. While the Penney case might be distinguished as involving an allocation formula, that feature is not material. The allocation merely confined Wisconsin's reach to its grasp. As involves Petitioner herein, no allocation was necessary. All of Petitioner's sales were in Pennsylvania. It had no place of business elsewhere. The nature of the tax and the situation of the parties did not call for tax apportionment: *Interstate Oil Pipe Line Co. v. Stone,* 337 U.S. 662, 69 S. Ct. 1264.

(2) THE STATE SUPREME COURT PROPERLY HELD THAT NO TAX UPON THE TRANSACTION BY ANY SISTER STATE WOULD BE IN ANY WAY RELATED TO THE SALES TRANSACTIONS BETWEEN PETITIONER AND ITS CUSTOMERS, UPON WHICH ALONE THE INSTANT TAXES ARE BASED. No tax by another State could, therefore, duplicate the tax or place an additional, discriminatory or undue burden upon interstate commerce.

It is recognized that any tax which in any way affects interstate commerce is a burden thereon to some extent. The test of the validity of a state tax statute in respect both to what it provides and to the construction and application thereof is whether or not such

burden is direct, discriminatory or undue. Respondents submit that the instant tax burdens are neither. We have discussed above the complete lack of discrimination and the incontrovertible presence of adequate and recognized local incidents.

No further discussion appears to be necessary to demonstrate that the challenged taxes are completely local in their impact upon the privilege of selling, are not directed against interstate selling, and as such cannot possibly be duplicated by any other State. Petitioner, however, contends that under *Freeman v. Hewit, supra,* the State Supreme Court erred in its application of the multiple burden theory. It is submitted that the answer of the State Supreme Court, *supra,* page 801 of 97, A. 2d, 797, effectively refutes Petitioner's contention. When, however, Petitioner says that this Court, in 1946, "put an end to the multiple burden theory" in *Freeman v. Hewit, supra,* it makes a statement that demands further scrutiny and is not substantiated by later decisions by this Court.

The multiple burden theory, first advanced in *Western Live Stock v. Bureau of Revenue, supra,* in 1938, runs as a consistent thread tying together the decisions of this Court since that time. While the language in the majority opinion in *Freeman v. Hewit, supra,* tempers somewhat the multiple burden theory, it does not "put an end to" the theory. The decision in that case recognized the theory and is consistent with it, as Mr. Justice Rutledge noted in his concurring opinion.

In *Freeman v. Hewit, supra,* Indiana was denied the right to tax receipts from a transaction in which an *Indiana seller* sold securities through the New York

Stock Exchange to a *buyer in New York.* Obviously New York, the State where the securities were delivered to a *resident buyer,* could tax the transaction by taxing the buyer; consequently Indiana was denied the right to tax. This affirms the well recognized proposition that *as between* the *state of the seller* and the *state of the buyer,* the latter state *can impose* a gross receipts tax. In the instant case seller and buyer are not *in two different states;* they are *in the same state.* The matter of *residence,* contrary to Petitioner's contention, in one breath, that it is of *no importance* and in the next breath, it is of *only limited importance,* is *all important* in matters of *commerce among states.*

Later decisions of this Court do not accept the *Freeman v. Hewit* decision as the death knell of the multiple burden theory. If so, how can one explain the decision in *Interstate Oil Pipe Line Co. v. Stone,* 337 U.S. 662, 69 S. Ct. 1264, 1267, wherein, in 1949, this Court sustained the tax there challenged because, *inter alia,* "no other state can repeat the tax"? In that case the tax was imposed on the gross receipts of an *intrastate* pipe line used in transporting oil into *interstate* commerce, all activities were carried on in Mississippi, and the tax did not discriminate against interstate commerce in favor of intra-state commerce of like character.

Norton v. Department of Revenue of Illinois, 340 U.S. 534, 71 S. Ct. 377, in 1951 construed the Illinois Retail Occupation Tax, which in *every material respect* is identical with the Mercantile Taxes now challenged by Petitioner. There the tax was on the *occupation* of *vendor,* was *measured* by *gross receipts,* and *"business in interstate commerce" was specifically exempted;*

exactly the same as in the Act and Ordinance now challenged. In the Norton case, the transactions involved were held to be either wholly taxable or wholly exempt under the commerce clause. As to those ruled exempt, this Court (the majority) said:

> "The only items that are so clearly interstate in character that the State could not reasonably attribute their proceeds to the local business are orders sent directly to Wooster (Massachusetts) by the customer and shipped directly to the customer from Wooster." 71 S. Ct. page 381, 340 U.S. 534, at page 539.

The minority opinion of this Court — Reed, J. and concurred in by Black and Douglas, J.J. — dissented solely on the ground that even those transactions were taxable.

The Norton opinion thus not only establishes the fact that a State tax identical with the taxes herein under attack *has been upheld as valid* under the commerce clause and that this Court *has decided* the very issues involving statutory provisions and facts identical with those in the instant case, of which more, *infra*. Of particular interest for the moment, however, it is to be noted that the multiple burden theory was still very much alive in that decision.

(3) THE QUESTIONS RAISED BY PETITIONER ARE NOT OF FIRST IMPRESSION IN THIS COURT.

Even if no case arising out of the identical facts had been presented to this Court, it could not be contended seriously that the identical issues have not been considered. Many decisions by this Court, including

cases cited above, have ruled upon questions of discrimination against interstate commerce, undue burden thereon, the significance of local incidents and the power, or the lack of it, by other states to duplicate the challenged tax of another state. But, as reference above to *Norton v. Department of Revenue, supra, Freeman v. Hewit, supra, Western Live Stock v. Bureau of Revenue, supra, Interstate Oil Pipe Line Co. v. Stone, supra,* and *Spector Motor Service v. O'Connor,* 340 U.S. 602, 71 S. Ct. 588 — particularly the Norton case — demonstrate, not only the identical issues, but the identical facts have been ruled upon by this Court.

For further emphasis upon this question, *International Harvester Company v. Department of Treasury,* 322 U.S. 340, 64 S. Ct. 1019, is directly in point. Indiana's gross income tax law is comparable to the Act and Ordinance herein challenged. It provides a "privilege tax on gross income" or upon "gross receipts from commerce". The receipts came from transactions (a) in which customers, whether in Indiana or elsewhere, took delivery in Indiana from Indiana factories, and (b) also included transactions in which the goods to fill orders of Indiana were shipped into Indiana from other states. With reference to the second category, this Court said:

> "* * * where a state seeks to tax receipts from interstate transactions consummated within its borders, its power to do so cannot be withheld on constitutional grounds where it treats wholly local transactions in the same way." 64 S. Ct. at page 1023, 322 U.S. 340 at page 349.

This aptly describes the taxes herein challenged. See also *Central Greyhound Lines v. Mealey,* 334 U.S. 658,

68 S. Ct. 1263 (1948), *Wisconsin v. J. C. Penney Co.*, 311 U.S. 435, *Gwin, White & Prince v. Henneford*, 305 U.S. 434, 59 S. Ct. 325, *Robertson v. People of State of California*, 328 U.S. 440, 66 S. Ct. 1160.

On February 9, 1953, this Court rendered an opinion which so far as we can determine is the most recent case upon this subject. That case was *City of Chicago v. Willett Co.*, ... U.S. ..... 73 S. Ct. 460. This opinion indicated that Mr. Justice Frankfurter, the writer of the majority opinion in the *Freeman v. Hewit* case, did not go as far from the trend of other decisions as Petitioner contends. Speaking for the majority of the Court in the Willett Co. case, Mr. Justice Frankfurter states, *inter alia*: "Once more we are called upon to pass on the validity of a tax which falls in some measure upon commerce 'among the several states'. * * * 'It being once admitted, as of course it must be, that *not every law that affects commerce among the states is a regulation of it in a constitutional sense,* nice distinctions are to be expected'. (cases cited) * * * The central and decisive fact in this case is that Respondent's business has, as much as any transportation business can have, a home. That home is Chicago. To the extent that Respondent's business is not confined within the City's limits, it revolves around the City. * * * In the circumstances, a tax of reasonable proportions such as the one in question not shown in fact to be a burden on interstate commerce, is not inconsistent with the Commerce Clause." 73 S. Ct. at pp. 461, 463 (Emphasis supplied)

Conclusion.

Respondents submit, therefore, that Petitioner has presented no sound or conclusive reason on jurisdictional grounds or on the merits why this Court should grant the requested writ for certiorari. No special or compelling reason has been shown for this Court to deviate from its rule of exercising its discretion to grant writs of certiorari sparingly. The questions raised in the petition have both in principle and on the facts been decided by this Court in numerous instances, so that the law controlling the issues raised in the petition are well established. Respondents submit that the law so established is adverse to Petitioner and that, therefore, the instant petition for a writ of certiorari should be denied forthwith.

Respectfully submitted,

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HAROLD B. WILLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

NO. 369

KEYSTONE METAL COMPANY, Petitioner,

v.

CITY OF PITTSBURGH, JAMES P. KIRK, Treasurer of the City of Pittsburgh, SCHOOL DISTRICT OF PITTSBURGH, et al., etc., Respondents.

PETITION OF KEYSTONE METAL COMPANY FOR REHEARING OF ORDER DENYING WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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INDEX

	PAGE
Petition of Keystone Metal Company for Rehearing of Order Denying Writ of Certiorari to the Supreme Court of Pennsylvania	1
Question Presented	2
Application of Question Presented to Facts in This Case	2
Grounds for Rehearing	3
Conclusion	5
Certificate of Counsel Pursuant to Rule 33(2)	6

CITATIONS

Gross Income Tax Division of the State of Indiana v. L. S. Ayres and Company, S. Ct. of Ind., Cause 28948	3, 5
Sales and Gross Receipts Tax Regulations	4

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To the Honorable, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

The petitioner, Keystone Metal Company, respectfully prays for a rehearing of the order issued on November 16, 1953, denying petitioner's prior petition for a writ of certiorari to the Supreme Court of Pennsylvania.

QUESTION PRESENTED

Whether the proceeds of a sale between a seller and a buyer both located in the taxing state involving the shipment of goods from a point of origin *outside the taxing state* to a point of destination in another state *outside the taxing state* are exempt from taxation under Article I, Section 8, of the Constitution of the United States.

APPLICATION OF QUESTION PRESENTED TO FACTS IN THIS CASE

Substantially all the sales in issue in the instant case involve shipment *from* a point outside the taxing state *to* a point in another state outside the taxing state. In a few instances, however, the sales involve shipment from a point of origin *within* the taxing state. In *all* instances, however, the shipment is to a point of destination outside both the taxing state and the state of origin. The court to which the writ of certiorari is directed drew no distinction between the two classes of sales. Since petitioner is of the opinion that in all events sales of the type described in the question presented are protected from local taxation by Article I, Section 8, of the Constitution, those sales in particular are singled out as affording complete grounds for granting of certiorari here.

GROUNDS FOR REHEARING

I.

There is now pending in the Supreme Court of Indiana (Cause No. 28948) an appeal from the Marion Superior Court, Room 3, of Marion County, Indiana, in a case entitled Gross Income Tax Division of the State of Indiana, appellant, v. L. S. Ayres and Company, appellee, involving the question of the taxability of sales by the state of the buyer and seller where shipment is from a point of origin within the taxing state to a point of destination outside the taxing state. The decision rendered by the court below in that case squarely contradicts the decision of the Supreme Court of Pennsylvania in petitioner's case and, if affirmed on appeal, will result in a direct conflict between the two highest courts of the states of Pennsylvania and Indiana on the important question of taxability of interstate sales, where the taxes involved are on the privilege of engaging locally in interstate business.

II.

The decision of the Supreme Court of Pennsylvania in the instant case stands alone in upholding the taxability by the state of the buyer and seller of the proceeds of sales involving shipment from one point outside the taxing state to another point outside both the taxing state and the state of origin, and, of even greater importance, is inconsistent with the great body of regulatory law in effect in the substantial number of states having sales and gross receipts taxes.

The following nineteen states and the District of Columbia have rules or regulations specifically exempting

sales between a buyer and a seller located in the taxing state where the shipment originates *in* the taxing state but the *destination* is *outside* the taxing state:

Alabama, Rule I 14-012-014
California, Ruling No. 2015(C)
Colorado, Rule No. 45(B)
Dist. of Col., Reg. Sec. 401(1)
Florida, Rule 64
Illinois, Art. 5, II 2
Iowa, Rule No. 180, 2
Kansas, Reg. 94-6-8-C-1
Louisiana, Art. 2-29
Maryland, Rule No. 64
Michigan, Rule No. 41
Missouri, Reg. N(e)
North Dakota Rule No. 37
Ohio, Rule 139
Pennsylvania, Reg. 251
Rhode Island, Reg. 6/30/47
South Carolina, Reg. 33
South Dakota, Reg. IV(1)(A)(b)
Utah, Reg. 44
Washington, Rule 193

Only two states having sales or gross receipts taxes have attempted to impose their taxes on sales of the above character, and, of these, the state of Mississippi specifically exempts a sale of the type principally involved in the instant case, where the shipment both *originates* and *terminates* outside the taxing state (Rule No. 38).

Petitioner has been able to discover no instance in which a state having a sales or a gross receipts tax attempts to tax sales involving different states of origin and destination outside the state of the buyer and seller.

It is of vital importance, therefore, that the lone exception to the immunity granted to interstate sales of the type here involved be considered by this Court promptly and decisively to the end that some measure of stability in the treatment of transactions of this nature may be preserved. Otherwise, it is inevitable that the judicial floodgates will be opened and even sales of the type involving *destination only* outside the taxing state will become the subject of widespread litigation, leading to the substitution of judicial chaos and uncertainty for clarity and stability.

Conclusion.

Petitioner respectfully suggests with respect to Ground I of this Petition that if your Honorable Court prefers to await the decision by the Supreme Court of Indiana in Cause 28948 pending in that court to determine whether or not a conflict will materialize between the highest courts of two states, the decision on the present petition for rehearing might be postponed until that time.

Respectfully submitted,

KEYSTONE METAL COMPANY, Petitioner

By EARL F. REED

LEE W. ECKELS

Attorneys

CERTIFICATE OF COUNSEL PURSUANT TO RULE 33(2)

Counsel for petitioner hereby certifies that this Petition is presented in good faith and not for delay and that the Petition is restricted to the grounds above specified.

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FILED
DEC 4 1953
HAROLD B. WILLEY, Cle

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

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BRIEF IN OPPOSITION TO PETITION FOR REHEARING OF ORDER DENYING WRIT OF CERTIORARI

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INDEX TO BRIEF

		PAGE
I.	Petitioner States No Grounds Available and Not Previously Presented	1
II.	The Petition for Rehearing States No Intervening Circumstances of Substantial or Controlling Effect, as Contemplated by Rule 33, Section 2	2
III.	Respondents Rely on Their Brief in Opposition to Granting a Writ of Certiorari	4
Conclusion		5

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BRIEF IN OPPOSITION TO PETITION FOR REHEARING OF ORDER DENYING WRIT OF CERTIORARI

Respondents, City of Pittsburgh and the School District of Pittsburgh et al., respectfully request Your Honorable Court to deny the Petition filed herein by Keystone Metal Company for rehearing of Order issued on November 16, 1953, denying its Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania, for the following reasons:

I. Petitioner States No Grounds Available and Not Previously Presented.

The Petition for Rehearing states no new facts, no new or additional circumstance of an exceptional character and no new or additional federal question of sub-

stance not heretofore determined by this Court. All available reasons or grounds which could be addressed to this Court for assuming jurisdiction and granting a Writ of Certiorari were fully and exhaustively presented by Petitioner in its brief submitted in support of the Petition for the Writ. No other facts, circumstances, reasons or grounds are suggested in the Petition for Rehearing.

The argument now made that the decision of the Supreme Court of Pennsylvania opens the judicial flood gates to wide spread litigation, judicial chaos and uncertainty was presented, without merit, in Petitioner's brief in support of the Petition for the Writ. No merit is added to that argument by Petitioner's present reliance upon the *possibility* that a decision *not yet made* may be in conflict with the decision *already made* in the instant case by the Supreme Court of Pennsylvania. (See Page 3 of Petition for Rehearing.)

II. The Petition for Rehearing States No Intervening Circumstances of Substantial or Controlling Effect, as Contemplated by Rule 33, Section 2.

Petitioner now bases its contention on a case *pending in but not yet decided* by the Supreme Court of Indiana. As to that case, pending when Petition for the Writ was filed, one can only speculate as to what the decision will be. On the merits, the pending Indiana case involves a gross income tax. Respondent's mercantile taxes are imposed on the privilege of vending or selling within their co-terminous territorial limits—a tax altogether different in character, imposition and impact. Whether or not a *future* decision by the Indiana Supreme Court is in conflict with the challenged decision of the Pennsylvania

Supreme Court is completely beside the point. The real issue will be whether or not the facts and issues of the pending case are so decided as to conflict with the decisions of this Court.

Petitioner's position, therefore, rests on matters far too remote, uncertain, speculative and nebulous to merit consideration as sound and compelling reasons for either granting the Petition for Rehearing or for postponing a decision thereon until the pending Indiana case is decided.

Petitioner argues now that the decision of the Pennsylvania Supreme Court violates a great body of regulatory law in a substantial number of States having sales and gross receipts taxes. In citing, but not giving the substance of the regulations of nineteen States *including Pennsylvania,* Petitioner does not in any manner identify the type of tax to which they apply. Respondents readily admit that regulations may and do differ, but that is of no argumentative significance. Rules and regulations are merely administrative implementations of the taxing statute or ordinance. As such, they must be *within* the scope of, and consistent with, the tax legislation to which they apply. The Appellate Courts of Pennsylvania have upheld Respondents' mercantile tax rules and regulations. In any event, Regulations are not basic law; they stand or fall with the statute they implement.

The regulations relied on by Petitioner all relate to receipts from sales made by a *seller within* a state to *customers in other states.* Respondents admit that in such cases the receipts are not, under the commerce clause, subject to tax. In fact, the tax act and the tax ordinance as well as the regulations thereunder exempt

from the tax the receipts from any business "not within the taxing power of the Commonwealth under the Constitution of the United States." In the instant case the receipts taxed came from *purely local* transactions, fully consummated *within Pittsburgh* between a *Pittsburgh seller* and a *Pittsburgh buyer,* the goods having never been in Pennsylvania. Under Respondents' tax, it isn't commerce, but the *privilege* of selling that is taxed, with no discrimination whatsoever against interstate commerce and imposing no direct burden thereon. All along, Petitioner has confused the *taxing state* with the *state wherein the exercise of the privilege of selling* is what is taxed.

Respondents submit the tax here challenged is not prohibited by the Constitution of the United States.

III. Respondents Rely on Their Brief in Opposition to Granting a Writ of Certiorari.

In that brief authorities are cited in support of Respondents' position. While applicable to matters raised in the Petition for Review, the arguments and authorities cited therein need not be repeated here.

Conclusion.

Petitioners instant argument presents no additional ground for the assumption of jurisdiction by this Court, no exceptional circumstances, no federal question of substance not heretofore determined by this Court, no reason why Respondents' tax is not valid and constitutional and no compelling intervening circumstance, and hence no reason for reconsideration, immediate or postponed. The argument now made on the basis of apprehensive speculation is untenable. Each case must rest on its own facts. On that basis this Court has already spoken with respect to the instant case, and correctly. Wherefore, Respondents pray this Court to deny the Petition for rehearing.

Respectfully submitted,

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